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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-510

WISCONSIN DEPARTMENT
OF REVENUE,
Petitioner,

v.

MIDWESTERN GAS
TRANSMISSION COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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IN THE
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October Term, 1978
No. _____

WISCONSIN DEPARTMENT
OF REVENUE
Petitioner,

v.

MIDWESTERN GAS
TRANSMISSION COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF WISCONSIN

The petitioner, Wisconsin Department of Revenue, respectfully prays that a writ of certiorari issue to review the final judgment and opinion of the Supreme Court of the State of Wisconsin entered June 30, 1978.

OPINIONS BELOW

The opinion and judgment of the Wisconsin Supreme Court is reported as *Midwestern Gas Transmission Co. v. Revenue Dept.*, 84 Wis.2d 261, 267 N.W.2d 253 (1978). The opinion of the Wisconsin Supreme Court and the unreported opinions of the Circuit Court for Dane County and the Wisconsin Tax Appeals Commission appear in the appendix hereto.

JURISDICTION

The judgment of the Circuit Court for Dane County was dated June 18, 1976, and was entered June 21, 1976. That judgment held that imposition of the Wisconsin use tax upon the use by the respondent of certain natural gas, pursuant to sec. 77.53, Wis. Stats., violates the commerce clause, U.S. Const. art. I, sec. 8. On June 30, 1978, the Wisconsin Supreme Court affirmed the lower court judgment, and this petition for a writ of certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. sec. 1257(3).

QUESTIONS PRESENTED

When a company operating an interstate natural gas pipeline from Minnesota into Wisconsin withdraws gas from the pipeline in Wisconsin, reduces the pressure of such gas and consumes it in Wisconsin in engines used to run compressors necessary to keep the gas moving through the pipeline, is the imposition of the Wisconsin use tax on the gas consumed in Wisconsin violative of the commerce clause?

The Wisconsin Supreme Court held in the affirmative.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, art. I:

"SECTION 8. The Congress shall have power

"* * *

"To regulate commerce with foreign nations, and among the several states . . . ."

Section 77.53, Wis. Stats.:

"Imposition of use tax. (1) An excise tax is hereby levied and imposed on the storage, use or other consumption in this state of tangible personal property or taxable services described in s. 77.52 purchased from any retailer . . . ."

Section 77.51, Wis. Stats.:

"(7) 'Retailer' includes:

"(a) Every seller who makes any sale of tangible personal property . . . ."

STATEMENT OF THE CASE

The respondent, hereinafter called Midwestern, buys Canadian natural gas at the Manitoba-Minnesota border and transports it through Midwestern's pipeline from that point to Marshfield, Wisconsin. Some gas is sold to Wisconsin customers west of Marshfield, for resale, but the bulk of it is sold and delivered to another pipeline company at Marshfield.

Some gas is consumed by Midwestern at its two compressor stations in Wisconsin. These stations are necessary to increase the pressure of the gas in the pipeline in order to keep it flowing. At each station some gas is withdrawn from the pipeline, filtered or strained to remove foreign particles, metered, reduced in pressure and used to fuel engines which run the compressors. The gas withdrawn from the pipeline never comes to rest prior to being consumed in the engines.

The petitioner made an assessment of use taxes against Midwestern for the period from September 1, 1969, to December 31, 1971, based upon the use of the gas withdrawn from the pipeline and consumed at the compressor stations in Wisconsin. A petition for redetermination of that assessment was denied, and Midwestern appealed to the Wisconsin Tax Appeals Commission which affirmed the assessment, holding that imposition of the tax was not prohibited by the commerce clause. Midwestern then appealed to the Circuit Court for Dane County, and the order of the Commission was reversed upon the sole ground that the assessment violated the commerce clause. The Wisconsin Supreme Court affirmed the lower court, again upon the sole ground that the commerce clause prohibited the assessment. See p. 12a of appendix hereto.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With Decisions Of This Court.

The Wisconsin Supreme Court relied upon *Helson v. Commonwealth of Kentucky*, 279 U.S. 245 (1929), and cases which followed it. The petitioner concedes that if *Helson* is still viable, the tax now in issue is unconstitutional.

Helson held unconstitutional, under the commerce clause, a Kentucky tax upon the use in Kentucky of fuel purchased in Illinois to propel an interstate ferry. The opinion stated, 279 U.S. at 252, that the tax was "exacted as the price of the privilege of using an instrumentality of interstate commerce," and continued: "A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce."

Several years after *Helson*, in *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U.S. 604 (1938), a Louisiana horsepower tax upon the horsepower of engines used to run compressors to maintain the flow of natural gas through an interstate pipeline was attacked as violative of the commerce clause. The tax was sustained, although the Court regarded it "as one upon the privilege of producing the power" (303 U.S. at 609).

Colonial Pipeline Company v. Traigle, 421 U.S. 100 (1975), sustained yet another Louisiana tax which involved an exclusively interstate pipeline operation. By the terms of the statute the tax was imposed upon qualification to do business in Louisiana or actually doing business there in a corporate form. The opinion states that the controlling test, under the commerce clause, " 'is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded' " (421 U.S at 108-109).

Two very recent cases have overruled *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951)—which held that a tax on the privilege of engaging in an activity within a state may not be applied to an activity which is part of interstate commerce—and have established a new test for determining the validity, under the commerce clause, of state taxes. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), *reh. denied* 430 U.S. 976 (1977); and *Dept. of Rev., Etc. v. Ass'n of Wash. Steve. Co.*, 98 S.Ct. 1388 (1978). *Washington Stevedoring* stated, 98 S.Ct. at 1399:

> " . . . The Court repeatedly has sustained taxes that are applied to activity with substantial nexus with the State,

> that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the State. . . ."

Complete Auto Transit, supra, states the test in almost identical language, 430 U.S. at 277.

The opinion of the Wisconsin Supreme Court refers to this four-pronged test and continues, 84 Wis.2d at 270 (Appendix p. 11a):

> "Under this analysis, the key question here is whether the activity the department seeks to tax has a substantial nexus with the state. In this respect, the *Helson* determination that property which is used to fuel a vehicle of interstate commerce may not be subjected to a use tax remains relevant. That the Supreme Court has not abandoned this position is shown by its decision in *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 629-30 (1973) . . . ."

The Wisconsin Court's opinion goes on to say that although the tax here involved is imposed upon the use of natural gas in Wisconsin, "this consumption is an integral part of the process of interstate commerce which does not have a substantial nexus with the state." Therefore, the opinion held, the use of the gas was immune from state taxation by reason of the commerce clause.

It is submitted that the Wisconsin Supreme Court has missed the significance of *Complete Auto Transit, supra,* and *Washington Stevedoring, supra,* which rejected the reasoning of *Helson, supra,* and *Spector Motor Service, supra,* and frankly sustained a state tax upon an integral

part of an interstate commerce operation, where the tax met the four criteria. The fact that *Helson* has not been overruled is irrelevant, because the basis of the *Helson* ruling has been rejected.

In *Washington Stevedoring* the opinion noted, 98 S.Ct. at 1399:

> " . . . The record contains nothing that minimizes the obvious nexus between Washington and respondents; indeed, respondents conduct their entire stevedoring operations within the State . . . ."

That same reasoning is applicable here. Wisconsin seeks to tax only the use of gasoline consumed within Wisconsin, and there is an obvious nexus between that use and Wisconsin. No question has been raised in the instant matter as to whether the tax meets the other three criteria of the four-pronged test.

CONCLUSION

It is therefore respectfully submitted that certiorari should be granted or that in the alternative the decision below should be summarily reversed.

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E. WESTON WOOD
Assistant Attorney General
Attorneys for Petitioner

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No. 76-106
August Term, 1977
STATE OF WISCONSIN : IN SUPREME COURT

Midwestern Gas Transmission Co.,
Respondent,

FILED: June 30, 1978

v.

Wis. Dept. of Revenue,
Appellant.

APPEAL from a judgment of the circuit court for Dane county: MICHAEL B. TORPHY, Circuit Judge. *Affirmed.*

This is a state use tax case. The respondent, Midwestern Gas Transmission Co. (hereinafter taxpayer), owns and operates a pipeline through which it transports natural gas. The pipeline begins at the Manitoba-Minnesota border, and runs in a generally southwesterly direction to Marshfield, Wisconsin. The taxpayer purchases natural gas from a Canadian supplier and sells it to various customers, three of which tap the taxpayer's line at different points in Wisconsin. One of these is another pipeline company which takes the bulk of the gas brought into the state by the taxpayer.

The taxpayer consumes some gas at two compressor stations located in Wisconsin. The stations are necessary to increase the pressure of the gas in the pipeline in order to keep it flowing. At each station a small amount of gas is withdrawn from the pipeline, filtered or strained to

remove foreign particles, metered, reduced in pressure and used to fuel engines which run the compressors. The gas taken from the pipeline never comes to rest before it is consumed.

In May, 1972, the appellant, Wisconsin Department of Revenue, issued a notice of sales and use tax assessment against the taxpayer on the gas consumed at its two Wisconsin pumping facilities during the period of September 1, 1969 to December 31, 1971. The value of the gas was stipulated and the tax, with interest, was set at $11,972.86. A petition for the redetermination of the assessment was denied by the department, and affirmed on appeal to the Commission. The taxpayer appealed to the circuit court where the Commission's order was reversed. The department appeals.

HANLEY, J. The sole issue presented on this appeal is whether natural gas consumed at the taxpayer's Wisconsin compressor stations is subject to the Wisconsin use tax, sec. 77.54(1), Stats.

The department seeks to impose a tax on that amount of natural gas consumed by the taxpayer at its two pumping stations pursuant to sec. 77.53(1), Stats. This section provides:

> "Imposition of use tax. (1) An excise tax is hereby levied and imposed on the storage, use or other consumption in this state of tangible personal property or taxable services described in s. 77.52 purchased from any retailer on or after February 1, 1962, at the rate of 3% of the sales price of the property or taxable services; but beginning on September 1, 1969 the rate of the tax hereby imposed shall be 4%."

The department does not claim that the tax is imposed on the taxpayer's storage of natural gas in this state, but rather claims that the taxpayer uses or consumes the gas within the meaning of the statute. Furthermore, neither party disputes the facial applicability of this taxing section to the taxpayer's use of natural gas except as it may be exempt from taxation under sec. 77.54(1), Stats. This section provides:

> "General exemptions. There are exempted from the taxes imposed by this subchapter:
>
> "(1) The gross receipts from the sale of and the storage, use or other consumption in this state of tangible personal property and services the gross receipts from the sale of which, or the storage, use or other consumption of which, this state is prohibited from taxing under the constitution or laws of the United States or under the constitution of this state."

After an administrative hearing to review the department's refusal to redetermine its assessment, the Commission concluded, *inter alia*, that the assessment was not "prohibited by Article I, Section 8, Clause 3 of the United States Constitution" and thus was not "exempt within the intent and meaning of sec. 77.54(1) of the Wisconsin Statutes." The circuit court, however, concluded that the tax violated the Commerce Clause and for that reason reversed the order of the Commission.

[1]
The resolution of the conflict between the constitutional protection of free interstate commerce and the states' reserved power to tax must be accomplished on a case-by-case basis, with the particular facts and statutory characteristics determining the outcome. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977).

In *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 165 (1954), the Court stated generally, "Under the Commerce Clause interstate commerce and its instrumentalities are not totally immune from state taxation, absent action by Congress." Rather, the Court continued, "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it." *Michigan-Wisconsin Pipe Line Co. v. Calvert, Supra* at 166.

The department asserts that "the tax imposed is nondiscriminatory and has not been shown to be unreasonable in its exaction in relation to the benefits granted by the goverenment [sic] of this state. (A. Brief at 8). This is essentially true. Nowhere does the taxpayer claim that the use tax imposed by sec. 77.53, Stats., discriminates against interstate commerce in favor of local enterprise. Nor has the taxpayer demonstrated that the tax is unreasonably disproportionate to benefits derived from the state. What the taxpayer does claim, however, is that the tax, as applied to the facts of this case, is an improper burden upon an activity which is an integral and inseparable part of the interstate flow of its natural gas. In support of this claim, the taxpayer relies principally on *Helson and Randolph v. Kentucky*, 279 U.S. 245 (1929) (hereinafter *Helson*).

In *Helson*, the taxpayers, citizens and residents of Illinois, were in the business of operating a ferry on the Ohio River between Illinois and Kentucky. The taxpayers purchased gasoline to fuel the vessel's engines in Illinois, although seventy-five percent of it was consumed within the limits of Kentucky. Kentucky, which taxed all gasoline sold or used within the state, sought to impose the tax on that portion of the ferry's fuel consumed in Kentucky waters. The Supreme Court found the tax violative of the Commerce Clause, stating:

> "The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferry boat, would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less that the boat itself? A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. 'All restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States.' *Gloucester Ferry Co. v.*

Pennsylvania, Supra, p. 214." *Helson and Randolph v. Kentucky, supra* at 252.

In 1936, *Helson* was expressly followed by the Court in invalidating a state tax imposed upon the use of motor fuel to effect the movement of buses in interstate commerce. *Bingamen v. Golden Eagle Western Lines, Inc.*, 297 U.S. 626 (1936).

State courts have more recently applied the rule in the *Helson* case to situations similar to the one presented here. In *Texas Gas Transmission Corp. v. Benson*, 223 Tenn. 279, 444 S.W.2d 137 (1969), the object of the state use tax was that amount of natural gas diverted from the taxpayer's main transmission lines to fuel compressor engines. Characterizing the taxing statute as imposing tax liability on goods which are stopped or brought to rest within the state for sale, use, consumption, distribution or storage, the Tennessee Supreme Court found that the fuel gas did not come to rest within the state but was a part of a continuous flow and "a necessary and integral part of the [taxpayer's] interstate operation." *Texas Gas Transmission Corp. v. Benson, supra* at 139. The court thereupon applied the *Helson* rule to hold that the taxpayer's use of gas was exempt from the use tax. The same result was also reached by the Michigan Court of Appeals in *Michigan Wisconsin Pipe Line Co. v. State*, 58 Mich. App. 318, 227 N.W.2d 334 (1975), wherein the taxpayer's use of natural gas tapped from a main transmission line to power compressor engines was held, under authority of *Helson* and *Texas Gas Transmission Corp.*, to be exempt from a use tax statute which imposed a levy on the "privilege of using, storing and consuming tangible property brought from out of the state after it has come to rest." *Michigan Wisconsin Pipe Line Co. v. State*, 227 N.W.2d at 335-37.

The department concedes that if the *Helson* case is still valid, it would require an affirmance in the instant case. The department, however, argues that the *Helson* decision has been modified by subsequent Supreme Court decisions so as to change the rule prohibiting the imposition of a state use tax on a substance used to fuel interstate commerce.

The department first relies on several Supreme Court decisions to support its contention that the Court has moved away from the *Helson* rule. *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U.S. 604 (1938); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940); *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100 (1975). We think, however, that the department's reliance on these cases is misplaced.

In *Coverdale v. Arkansas-Louisiana Pipe Line Co., supra*, the taxpayer was engaged in the business of producing and buying, transporting and selling natural gas. The gas was obtained in Louisiana and over ninety-six per cent of it was delivered to customers outside the state. To move the gas through the pipeline, the taxpayer maintained a compressor station in Louisiana. Louisiana sought to impose a tax on the compressor under a statute which required a license tax to be paid by everyone within the state in the business of manufacturing or generating power for use in the conduct of business. Specifically, the statute imposed a tax of one dollar per annum per horsepower generated by a taxpayer in the state. The Supreme Court, characterizing "the tax as one imposing upon the privilege of producing . . .power," concluded that the statute was a valid exercise of the state's authority to impose a tax on the privilege of "carrying on a local business." *Coverdale v. Arkansas-Louisiana Pipe Line Co., supra* at 609-10.

The Court, relying on the distinction between taxes imposed on operations integral to and reasonably inseparable from the interstate movement of goods and those imposed upon operations related to but distinguishable from interstate commerce, concluded that the state statute which specifically taxed only the generation of power was not violative of the Commerce Clause. In reaching this result the Court did not overrule the *Helson* decision, however, but distinguished it as belonging "to the category of cases which construe the state tax acts involved as taxes on interstate commerce and its instrumentalities rather than on operations closely connected with but distinct from that commerce."

> "Likewise, in the *Helson* case, this Court concluded that the tax on gasoline brought into the state and used on an interstate ferry was analogous to a tax on the use of the ferry itself in transit and therefore within the rule prohibiting state taxes on commerce. A narrow distinction in fact exists between the tax held invalid in the *Helson* case and the valid tax considered in *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, where a tax on gasoline brought into the state, stored and then used to drive engines in interstate transportation, was held valid. The storage and withdrawal was an intrastate, taxable event." *Coverdale v. Arkansas-Louisiana Pipe Line Co., supra* at 611-12.

Because the taxing statute in the instant case bears a stronger resemblance to the gasoline tax invalidated in *Helson* than it does to the mechanically specific taxing

statute upheld in *Coverdale*, we think that it would not be appropriate for this court to rely on the analysis in *Coverdale* to uphold the department's use tax assessment upon the natural gas used to fuel the taxpayer's compressor engines. *Coverdale* clearly indicates that the Supreme Court was not abandoning the rule of *Helson*.

In *McGoldrick v. Berwind-White Coal Mining, supra*, a divided Supreme Court upheld a New York sales tax imposed upon coal mined in Pennsylvania, stored in New Jersey and delivered in New York. The majority, reasoning that interstate commerce should pay its fair share of the tax burden, concluded that the sales tax did not discriminate against interstate commerce and that it was imposed upon a local activity distinct from commerce: "Its [the tax's] only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end." *McGoldrick v. Berwind-White Coal Mining Co., supra* at 49. But again, the Court's decision in *McGoldrick* to view the transfer of title to goods which have crossed state lines as an event distinct from commerce and taxable by the state does not vitiate the Court's earlier conclusion that the consumption of fuel to move goods in interstate commerce was indistinguishable from that commerce and not subject to a state use tax.

In *Colonial Pipeline Co. v. Traigle, supra*, the Court upheld a Louisiana franchise tax imposed upon "the privilege of carrying on or doing business in the state in a corporate form." The Court emphasized the fact that the statute has been amended "purposely to remove any basis of a levy upon the privilege of carrying on an intrastate [sic] business and narrowly to confine the impost to one

related to appellant's activities within the state *in the corporate form.*" *Colonial Pipeline Co. v. Traigle, supra* at 113-14. (Emphasis supplied.) Noting that although it was not required to do so, the taxpayer voluntarily qualified under Louisiana law to conduct its business in that state in the corporate form and thereby derived numerous benefits provided by the state, the Court concluded that the tax was not improperly imposed "merely or solely for the privilege of doing interstate business in Louisiana." *Colonial Pipeline Co. v. Traigle, supra* at 113-14. Again, the taxable event in *Colonial Pipeline* is readily distinguishable from that which was sought to be taxed in *Helson* and that which is sought to be taxed here.

Both parties cite *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977) and *Washington v. Association of Washington Stevedoring Companies,*—U.S.—, 98 S. Ct. 1388 (1978) as authority sustaining their respective positions on the issue involved.

In *Complete Auto Transit, Inc. v. Brady, supra,* Mississippi levied a gross receipts tax on the privilege of doing business within the state. It applied the tax to the appellant, a Michigan corporation transporting within the state motor vehicles manufactured elsewhere. The appellant's sole argument against the tax was that it was the same type of direct taxation on the privilege of engaging in interstate commerce as was previously invalidated in *Spector Motor Service, Inc. v. O'Connor,* 340 U.S. 602 (1951). The Court, viewing the appellant's activity as being within interstate commerce, determined that because no absolute immunity from state taxation existed for interstate commerce, "a state tax on the 'privilege of doing business' is [not] *per se* unconstitutional when it is applied to interstate commerce. . . ." *Complete Auto*

Transit, Inc. v. Brady, supra at 289. Consequently, *Spector Motor Service, Inc. v. O'Connor, supra,* was overruled. In *Washington v. Association of Washington Stevedoring Companies, supra,* the Court rejected the rule of previous decisions that the constitutionality of a state tax depended solely on whether it amounted to direct or indirect taxation on interstate commerce.

In these cases, the Court abandoned two tests which looked primarily to the language of the taxing statute in favor of an analysis of the economic consequence the tax would have on interstate commerce. The Court also indicated four criteria which a taxing statute must satisfy to be valid under this analysis: (1) the activity taxed must have a substantial nexus with the state; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to services provided by the state. *Complete Auto Transit, Inc. v. Brady, supra* at 277, 287; *Washington v. Association of Washington Stevedoring Companies, supra* at 1399-1400.

Under this analysis, the key question here is whether the activity the department seeks to tax has a substantial nexus with the state. In this respect, the *Helson* determination that property which is used to fuel a vehicle of interstate commerce may not be subjected to a use tax remains relevant. That the Supreme Court has not abandoned this position is shown by its decision in *United Air Lines, Inc. v. Mahin,* 410 U.S. 623, 629-30 (1973), where the Court, in upholding an Illinois storage tax on aviation fuel consumed by the taxpayer's aircraft in interstate flights, stated:

"The line drawn between an impermissible tax on mere consumption of fuel, as in *Helson*, and a permissible tax on storage of fuel before loading, as in *Edelman* and *Nashville*, continues to serve rational purposes. Retaining the line at this point minimizes the danger of double taxation and yet provides a source of revenue having a relation to the event taxed. Double taxation is minimized because the fuel cannot be taxed by States through which it is transported, under *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954), nor by the State in which it is merely consumed, under *Helson*. A fair result is achieved because a State in which preloading storage facilities are maintained is likely to provide substantial services to those facilities, including police protection and the maintenance of public access roads."

[2]

Here, the department seeks to impose a use tax on that amount of natural gas consumed in engines which provide the pressure necessary to propel the great bulk of the taxpayer's gas through interstate commerce. Although this activity takes place within the state, we are satisfied that this consumption is an integral part of the process of interstate commerce which does not have a substantial nexus to the state. Thus, it remains immune from state taxation by reason of the Commerce Clause.

By the Court.—Judgment affirmed.

DAY, J., took no part.

STATE OF WISCONSIN
CIRCUIT COURT DANE COUNTY

Entered June 21, 1976

MIDWESTERN GAS TRANSMISSION COMPANY,

Petitioner, JUDGMENT

vs. Case No. 147-345

WISCONSIN DEPARTMENT OF REVENUE,
Respondent.

The above-entitled proceeding for review, under Chapter 227, Wisconsin Statutes, of a Decision and Order of the Wisconsin Tax Appeals Commission, dated June 17, 1975, in proceedings before said Commission designated as Docket No. S-4085, having come on before the Court, the Honorable Michael B. Torphy, Jr., Circuit Court Judge presiding, upon the record made before the said Commission; and Wheeler, Van Sickle, Anderson, Norman & Harvey, S.C. appearing for the petitioner, and Bronson C. LaFollette, Attorney General of Wisconsin, by E. Weston Wood, Assistant Attorney General, appearing for the respondent; and the Court having read the briefs and being fully advised in the premises and having rendered a written Decision dated June 1, 1976;

NOW, THEREFORE, upon motion of the attorneys for the petitioner,

IT IS HEREBY ORDERED AND ADJUDGED that the Decision and Order of the Wisconsin Tax Appeals Commission, dated June 17, 1975, in the proceedings before it designated as Docket No. S-4085, be and the same is

hereby reversed and the record herein is remanded to the said Commission for further proceedings not inconsistent with the decision of the Court entered herein; and

IT IS HEREBY FURTHER ORDERED that if no appeal be taken from this Judgment within 30 days after service of notice of entry thereof, or in the event of such appeal and remittitur of affirmance, the Clerk of this Court is directed to transmit to the Wisconsin Tax Appeals Commission the records of the proceedings before said Commission which was transmitted to this Court in accordance with Section 227.18, Wisconsin Statutes, together with a copy of this Judgment; and

IT IS HEREBY FURTHER ORDERED that no costs be taxed to any party herein.

Dated this 18th day of June, 1976.

BY THE COURT:

/s/Michael B. Torphy, Jr.
Circuit Judge

The above Judgment is approved as to form prior to signature, and Notice of Application for entry thereof is hereby waived.

Dated this 17th day of June, 1976.

BRONSON C. LAFOLLETTE
Attorney General of Wisconsin

By /s/ E. Weston Wood
E. Weston Wood, Assistant
Attorney General
Attorneys for Respondent

STATE OF WISCONSIN
TAX APPEALS COMMISSION

Entered June 17, 1975

MIDWESTERN GAS TRANSMISSION CO.,

Petitioner,

vs.

DOCKET NO. S-4085
DECISION AND ORDER

WISCONSIN DEPARTMENT
OF REVENUE,

(Drafted by
Commissioner Timken)

Respondent.

The above-entitled matter having come on to be heard before this Commission; the petitioner, Midwestern Gas Transmission Co., having appeared by its assistant secretary, A. L. Santi, and by its attorneys, Wheeler, Van Sickle, Day & Anderson, by Roland Day, and by Attorney John G. Brendel; the respondent, Wisconsin Department of Revenue, having appeared by Stanley C. Fruits, its Senior Tax Counsel; being fully advised in the premises and having considered all of the testimony, evidence and briefs of counsel, this Commission hereby finds and decides as

FINDINGS OF FACT

1. During the period involved herein and thereafter, the petitioner, Midwestern Gas Transmission Co., owned and operated a natural gas pipeline system which originated at the border between the United States and Canada at a point east of Emerson, Manitoba, where it connected with

Trans-Canada Pipeline Co., Ltd. From said point it extends southeasterly through Minnesota and into Wisconsin where it interconnects with the Michigan-Wisconsin Pipeline Co., at Marshfield, Wisconsin.

2. From the Canadian border to Marshfield, Wisconsin, the natural gas involved herein moves through petitioner's pipeline, having an outside diameter of 24 inches. Said natural gas is in motion at all times, from the time it leaves Canada until it is delivered at Marshfield.

3. During the period involved herein, the petitioner served three customers in Wisconsin through nine or ten outlets. Said sales were sales for resale which are exempt to the petitioner under Wisconsin sales and use tax law.

4. During the period involved herein and thereafter, the petitioner owned and operated eight compressor stations along its pipeline system described above. Two of the eight compressor stations are located in Wisconsin, one at St. Croix Falls and one at Chippewa Falls.

5. In order to keep the natural gas in motion, it is necessary to keep same under pressure to propel it through the petitioner's pipeline system. Said gas enters each of the two Wisconsin compressor stations specified above at a pressure of about 590 pounds per square inch and leaves the two stations at the increased pressure of about 800 to 877 pounds per square inch.

6. Increasing the pressure in the pipeline in Wisconsin is accomplished by compressors at the stations located at St. Croix Falls and Chippewa Falls which are operated by engines which use natural gas for fuel. The station at St. Croix Falls has three two-cycle reciprocating engines, each rated at 1,600 horsepower with each engine powering four

compressors. The station at Chippewa Falls has one solar turbine engine, rated at 2,710 horsepower, which powers one centrifugal compressor. It is the function of the compressors to increase the pressure of the gas flowing through the line. Said stations are and were during the period involved herein owned and operated by the petitioner.

7. In addition to using natural gas as fuel in the engines powering the compressors, the petitioner uses natural gas at its Wisconsin stations to heat and air condition the stations.

8. At the Chippewa Falls station, natural gas is drawn from the main pipeline through two taps, one tap serving the compressor engines and the other tap serving the heating, air conditioning and other functions located at said station.

9. At the St. Croix Falls station, natural gas is drawn from the pipeline through one tap. The line from the tap has two branches, one serving the compressor engine and the other serving heating, air conditioning and other functions at said station.

10. The natural gas drawn off the petitioner's main pipeline for heating, air conditioning and sundry purposes, while substantial in amount, constitutes approximately only .486 to .768 of 1% of the total gas drawn off the pipeline by the petitioner for use at the stations.

11. After said natural gas is drawn off the main pipeline for use by the petitioner at its two stations, it is metered, the pressure reduced, cleaned and completely consumed. No portion of said gas is returned to the main pipeline.

12. During the period September 1, 1969 through December 31, 1971, the petitioner used natural gas taken from its pipeline for the purposes specified above as follows:

Year	*Quarter Period*	*Natural Gas Cost*
1969	Sept.—Dec.	$17,194
1970	Jan.—March	$15,874
1970	April—June	$18,968
1970	July—Sept.	$20,010
1970	Oct.—Dec.	$28,007
1971	Jan.—March	$42,788
1971	April—June	$41,622
1971	July—Sept.	$45,520
1971	Oct.—Dec.	$49,867

Both parties agree on the amount of and the cost of the natural gas used by the petitioner at the stations for the said purposes for the period involved herein. The petitioner did not pay any Wisconsin use tax on any portion thereof, contending that the imposition of a tax on the gas consumed in the manner specified above contravenes the Interstate Commerce Clause of the United States Constitution Article I, Section 8, CL 3.

13. Under date of May 12, 1972, the respondent, Wisconsin Department of Revenue, issued a notice of sales and use tax assessment against the petitioner, Midwestern Gas Transmission Co., covering the period of September 1, 1969 to December 31, 1971 in the total amount of $11,972.86 taxing the natural gas specified in Finding No. 12 above.

14. On June 15, 1972 the petitioner filed a timely petition for redetermination of said May 12, 1972 assessment, and on August 4, 1972 the respondent denied same. Petitioner has appealed said action to this Commission.

15. The assessment in issue herein did not attempt to impose a sales or use tax on the natural gas flowing through the petitioner's two compressor stations in Wisconsin and natural gas delivered to the petitioner's customers.

WISCONSIN STATUTES INVOLVED

Section 77.53 Imposition of use tax.

"(1) An excise tax is hereby levied and imposed on the storage, use or other consumption in this state of tangible personal property or taxable services described in s. 77.52 purchased from any retailer on or after February 1, 1962, at the rate of 3% of the sales price of the property or taxable services; but beginning on September 1, 1969 the rate of the tax hereby imposed shall be 4%."

Section 77.51 Definitions. Except where the context requires otherwise, the definitions given in this section govern the construction of terms in this subchapter.

"(5) 'Tangible personal property' means all tangible personal property of every kind and description and includes electricity, natural gas, steam and water and also leased

property affixed to realty if the lessor has the right to remove the property upon breach or termination of the lease agreement, unless the lessor of the property is also the lessor of the realty to which the property is affixed. The term also includes coins and stamps of the United States sold or traded as collectors' items above their face value."

Section 77.54 General exemptions. There are exempted from the taxes imposed by this subchapter:

"(1) The gross receipts from the sale of and the storage, use or other consumption in this state of tangible personal property and services the gross receipts from the sale of which, or the storage, use or other consumption of which, this state is prohibited from taxing under the constitution or laws of the United States or under the constitution of this state."

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 3.
Section 8. The Congress shall have power

***

To regulate commerce with foreign nations, and among the several states, and with Indian tribes.

CONCLUSIONS OF LAW

1. Sections 77.53(1) and 77.51(5) of the Wisconsin Statutes impose a 4% use tax on the cost of the natural gas used by the petitioner at its two compressor stations during the period in question.

2. The tax assessed by the respondent on the use of natural gas by the petitioner in Wisconsin is not prohibited by Article I, Section 8, Clause 3 of the United States Constitution.

3. The tax assessed by the respondent on the use of natural gas by the petitioner in Wisconsin is not exempt within the intent and meaning of Section 77.54(1) of the Wisconsin Statutes.

Note: *McGoldrick v. Berwind-White Mining Co.*, 309 U.S. 33.
Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604.

Therefore,

IT IS ORDERED

That respondent's action on petitioner's petition for redetermination be and the same is hereby affirmed.

Dated at Madison, Wisconsin, this 17th day of June, 1975.

WISCONSIN TAX APPEALS COMMISSION
/s/ R. J. Smrz
R. J. Smrz, Chairman

/s/ Thomas R. Timken
Thomas R. Timken, Commissioner

/s/ John P. Morris
John P. Morris, Commissioner

Supreme Court, U. S.
FILED
OCT 24 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-510

WISCONSIN DEPARTMENT
OF REVENUE,
Petitioner,

v.

MIDWESTERN GAS
TRANSMISSION COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is reported at *Midwestern Gas Transmission Co. v. Department of Revenue*, 84 Wis. 2d 261, 267 N.W. 2d 253 (1978) and appears in petitioner's appendix (1a-14a). The unreported opinion of the Circuit Court for Dane County is set forth in respondent's appendix (1b). The unreported judgment of the Circuit Court for Dane County and the opinion of the Wisconsin Tax Appeals Commission appear in the petitioner's appendix (13a-14a) and (15a-21a), respectively.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the respondent's activity of transporting natural gas into Wisconsin through an interstate pipeline and consuming a portion of that gas in compressor stations in order to maintain the pressure necessary to sustain the movement of the gas in interstate commerce, without first storing or otherwise bringing the gas to rest within the State, lacks a substantial nexus with the State so that the Commerce Clause prohibits the imposition of the Wisconsin use tax on the amount of gas so consumed?

The Wisconsin Supreme Court held in the affirmative.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Commerce Clause, U.S. Const. art. I, §8, cl. 3:

> "The Congress shall have power ...
>
> ...
>
> "To regulate commerce with foreign nations, and among the several states..."

Section 77.53 (1), Wis. Stats. (1975):

> "An excise tax is hereby levied and imposed on the storage, use or other consumption in this state of tangible personal property or taxable services described in s. 77.52 purchased from any retailer on or after February 1, 1962, at the rate of 3% of the sales price of the property or taxable services; but beginning on September 1, 1969 the rate of the tax hereby imposed shall be 4%."

Section 77.51 (5), Wis. Stats. (1975):

> " 'Tangible personal property' means all tangible personal property of every kind and description and includes electricity, natural gas, steam and water ...."

Section 77.51 (7), Wis. Stats. (1975):

> " 'Retailer' includes:
>
> "(a) Every seller who makes any sale of tangible personal property or taxable service."

Section 77.54 (1), Wis. Stats. (1975):

> "There are exempted from the taxes imposed by this subchapter:
>
> "(1) The gross receipts from the sale of and the storage, use or other consumption in this state of tangible personal property and services the gross receipts from the sale of which, or the storage, use or other consumption of which, this state is prohibited from taxing under the constitution or laws of the United States or under the constitution of this state."

STATEMENT OF THE CASE

The respondent, Midwestern Gas Transmission Company (Midwestern) operates an interstate natural gas transmission pipeline which transports natural gas from the Manitoba-Minnesota border to a pipeline interconnection at Marshfield, Wisconsin. Although several of Midwestern's customers obtain gas for resale through various outlets along the pipeline, the bulk of the gas is sold to another

interstate pipeline company at Marshfield. (Petitioner's appendix at 1a, 15a-16a.)

The natural gas must be kept under pressure to propel it through the pipeline. Midwestern operates eight compressor stations along its pipeline to maintain the pipeline pressure; two of these stations are located in Wisconsin. At each station a small amount of gas is tapped from the pipeline, filtered, metered, reduced in pressure, and fed to engines to run the pipeline compressors. This gas is never stored or stopped; it flows continuously from the pipeline to consumption in the compressor engines. (Petitioner's appendix at 1a-2a, 16a-17a.)

In May, 1972, the petitioner, Wisconsin Department of Revenue, made an assessment of use tax against Midwestern for the natural gas consumed at its two Wisconsin compressor stations during the period of September 1, 1969, to December 31, 1971. The value of the gas so consumed was stipulated, and the tax was set at $11,972.86. (Petitioner's appendix at 2a, 18a.) Midwestern's petition for redetermination of the assessment was denied, and that denial was affirmed upon review by the Wisconsin Tax Appeals Commission, the Commission holding that imposition of the use tax did not violate the Commerce Clause. (Petitioner's appendix at 21a.)

Midwestern sought review of the Tax Appeals Commission decision in the Circuit Court for Dane County. That court reversed the order of the Commission upon the ground that imposition of the use tax would violate the Commerce Clause. (Respondent's appendix at 1b.) The Wisconsin Supreme Court affirmed the decision of the Circuit Court without dissent, holding that the respondent's activity of consuming gas in this

manner lacked a substantial nexus to the state and thereby was immune from state taxation by virtue of the Commerce Clause.

ARGUMENT

The Decision Below Is In Harmony With The Decision Of This Court.

In holding that the Wisconsin Department of Revenue's attempted imposition of the State's use tax in this case is invalid under the Commerce Clause, the Wisconsin Supreme Court correctly applied the multi-factored test most recently adopted by this Court in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977) and *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Co.,* 98 S.Ct. 1388 (1978). Referring specifically to the *Complete Auto Transit* and *Washington Stevedoring* decisions, the Wisconsin court observed:

> "In these cases, the Court abandoned two tests which looked primarily to the language of the taxing statute in favor of an analysis of the economic consequence the tax would have on interstate commerce. The Court also indicated four criteria which a taxing statute must satisfy to be valid under this analysis: (1) The activity taxed must have a substantial nexus with the state; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to services provided by the State."

Midwestern Gas Transmission Co. v. Department of Revenue, 84 Wis. 2d 261, 270, 267 N.W. 2d 253, 257-58 (1978) (Petitioner's appendix p. 11a).

Having noted the correct analysis to be applied to the case before it, the Court below went on to state at 84 Wis. 2d 270, 267 N.W. 2d 258 (Petitioner's appendix p. 11a):

> "Under this analysis, the key question here is whether the activity the department seeks to tax has a substantial nexus with the State."

The determination reached by the Wisconsin court was that the activity sought to be taxed by that State's taxing authority lacked a substantial nexus with the State and, therefore, was immune from state taxation by reason of the Commerce Clause.

In reaching this determination, the Wisconsin Supreme Court gave full consideration not only to the principles adopted in *Complete Auto Transit* and *Washington Stevedoring*, but also to prior decisions of this Court relating specifically to the imposition of a state use tax upon an interstate activity. In particular, the state court relied upon this Court's decision in *Helson v. Kentucky*, 279 U.S. 245 (1929), as an example of a tax found invalid because imposed upon an interstate activity which lacked a substantial nexus with the taxing state. In *Helson*, this Court struck down as violative of the Commerce Clause a Kentucky tax on the use in Kentucky of gasoline purchased in Illinois to fuel an interstate ferry. It is the petitioner's claim, however, that the decision in *Helson* is no longer valid and that the Wisconsin court's decision in the present case should be reviewed and reversed because of its misplaced reliance upon that decision.

While the rationale employed to strike down the use tax in *Helson* as being too direct a burden on interstate commerce has now been supplanted by the multi-factored test of *Complete Auto Transit*

and *Washington Stevedoring*, the Wisconsin court's reliance on *Helson* in determining that the activity sought to be taxed lacked a substantial nexus with the State was not erroneous. The Wisconsin Supreme Court determined that the activity of consuming natural gas during the course of its interstate flow for the purpose of providing the motive force for that flow, was, under the circumstances of this case, an activity lacking a substantial nexus with the state.

Petitioner presents no compelling reasons why this determination by the Wisconsin Supreme Court should be disturbed. The incidence of the tax in this case was on the use of respondent's natural gas for the limited purpose of powering the flow of commerce, not on the sum of respondent's business activities within the state. Had the tax been levied on a substantial business activity as was taxed in *Complete Auto Transit* and *Washington Stevedoring*, a sufficient nexus clearly would have been present.

The principles salient to a test of a state tax for validity under the Commerce Clause have been elucidated in detail by this Court in several very recent decisions, including *Complete Auto Transit, supra, Washington Stevedoring, supra,* and *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), among others. Petitioner presents no compelling reason why this Court should undertake yet another review of this issue.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: October 17, 1978.

Respectfully submitted,

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APPENDIX

STATE OF WISCONSIN
CIRCUIT COURT Br. 2
DANE COUNTY

MIDWESTERN GAS
TRANSMISSION CO.,
Petitioner,

vs.

WISCONSIN DEPARTMENT
OF REVENUE,
Respondent.

DECISION
Case No. 147-343

The court has reviewed the record herein and has concluded that the respondent is in error. This conclusion is based on *Helson v. Commonwealth of Kentucky* (1929), 279 U.S. 245, 49 S.Ct. 279, 73 L.Ed. 683. The Court of Appeals of Michigan, a similar fact situation, concluded that a state tax violated the Interstate Commerce Clause. *Michigan-Wisconsin Pipe Line Company v. State* (1975), 227 N.W. 2d 324, 58 Mich. App. 318. This court approves and adopts that opinion.

Accordingly, the court will reverse the decision and order of the respondent and abate the tax assessment as requested in the petition. Counsel for the petitioner may draft an appropriate order.

Dated this 1 day of June, 1976.

BY THE COURT:

/s/ Michael B. Torphy, Jr.
Hon. Michael B. Torphy, Jr.
Judge, Circuit Court, Br. 2